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DPA Legislative Proposals for 2013

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Allow DNA Testing for Innocence in Non-Capital Cases

"*I believe Kentuckians would be distressed to learn that not only are deserving inmates denied access to [DNA] testing, but the statute - as it is currently written - denies the ability to identify the true perpetrators of violent crimes by failing to include a provision in the law that affirms judicial discretion in comparing crime scene evidence to relevant DNA databases... Kentucky stands alone with Alabama in permitting only those who are convicted of capital crimes to seek testing.*" - Barry Scheck (Sept. 12, 2011 Letter to Public Advocate Ed Monahan)

In 2012, Kentucky failed once again to pass an expansion of DNA testing to include inmates serving lengthy prison sentences who may be innocent of the crimes for which they are serving time. House Bill 178, sponsored by Representative Johnny Bell (Glasgow), would have allowed defendants convicted of A or B felonies or violent felonies to have access to DNA testing if all of the following conditions are met: 1) evidence exists which has not been tested and which could be tested, 2) testing of the evidence, if favorable to the defendant, would create a probability of innocence, and 3) the defendant is still serving time for the offense. In response to concerns about the volume of frivolous requests if the bill passed, DPA agreed to serve as a gateway for claims, reviewing all applications and filing a motion in support if the claims had merit.

Claims that did not have merit, and for which a defendant could not pay the costs of testing, would be dismissed and require no response from a prosecutor. Nevertheless, despite passing the House Judiciary Committee unanimously, House Bill 178 died without a vote on the House floor.

DPA will again propose reasonable expansion of DNA testing in 2013.

State Needs to Change DNA Testing Law
Louisville Courier-Journal, May 17, 2012

It has been 23 years since the first person wrongly convicted of a crime was exonerated through the science of DNA testing. Since then, 289 people in 35 states found guilty of offenses have been exonerated through DNA tests, according to the Innocence Project website.

Yet Kentucky stands squarely behind the times when it comes to updating its laws and policies on DNA testing in cases where people claim they have been wrongly convicted for serious offenses.

Kentucky could - and should - do much better.

Convincing evidence comes from Jefferson County, where Commonwealth's Attorney Dave Stengel has a policy of allowing post-conviction DNA testing for any crimes as long as the testing is relevant and the offender pays for it. Such testing has exonerated two men convicted of rape and another of murder.

But some prosecutors around the state oppose expanding DNA testing, citing the costs if the state had to pay for it, and the increased workload for the already burdened state crime lab.

Lawmakers had a chance to address this issue in the 2012 session with House Bill 178, which would have expanded post-conviction DNA testing beyond current limits of state law. It also would have allowed testing after convictions on serious felonies and any crime designated as a violent offense.

But HB 178 … got scant attention and died in the House.

The Supreme Court could well decide the issue in Kentucky. But if not, lawmakers need to act next year to bring Kentucky into the current century when it comes to forensic science.

"*It's our obligation as prosecutors to do justice, not simply to convict and I think it would be wrong, horribly wrong, to allow somebody that we had very strong evidence that they didn't commit the crime, to let them sit there and suffer in prison. That is probably the highest level of injustice.*" - Dave Stengel (Jefferson Commonwealth Attorney)

Establish a Legal Standard Requiring Clear and Convincing Evidence for Pretrial Release Decisions

KRS 431.066 requires that a court, in making a pretrial release decision, consider the pretrial risk assessment and make a determination of whether the defendant is a flight risk, unlikely to appear for court, or a threat to the public. The law contains no standard by which this determination must be made. As a result, courts across the Commonwealth are inconsistent in how the risk assessment's results are applied to bond decisions.

House Bill 296, sponsored by Brent Yonts from the 2012 session, would have required courts to make pretrial release decisions on the basis of Clear and Convincing Evidence. This is fully consistent with House Bill 463's emphasis on evidence-based decision-making and is already the standard required by the federal Constitution, as explained in the case of *U.S. v. Salerno,* 481 U.S. 739 (1987). Writing the standard into the law would ensure that the goals of HB 463 as related to increased pretrial release are met and lead to greater consistency for defendants across the state. If courts consistently applied HB 463, even more savings would be possible.

Counties Have Saved Over $25 Million in Jail Costs

June 8, 2012 marked the first anniversary of the passage of HB 463, which was passed with the intention of increasing pretrial release. Not only does pretrial release give constitutional meaning to the concept of being presumed innocent until proven guilty, it also returns critical funds to local county budgets as long as it can be done without sacrificing public safety. In this area, the changes from HB 463 have been an unquestioned success.

Chief Operating Officer of the Administrative Office of the Courts' Pretrial Division Tara Boh Klute has provided data comparing the pretrial release figures for this first year with the previous year. The highlights of the data are as follows:

There were 244,881 cases (involving 180,304 individual defendants) handled by Pretrial Services from June 8, 2011 through June 7, 2012 compared to 267,011 cases (involving 197,553 individual defendants) over the same period of time in the previous year.

Of these cases, the defendants in 70.47% obtained pretrial release this year compared to 65.38% the previous year. Release rates for all three risk categories (low, moderate, high) increased at rates of 8%, 8%, and 3% respectively. The average length of pretrial release was 77 days.

Meanwhile, the public safety rate increased from 90% to 92% while the appearance rate remained steady at 89%.

In summary, both release rates AND safety rates went up with no decrease in appearance rates.

Applying an average cost of housing an inmate of $36.25 (from Kentucky's Auditor of Public Account's 2006 Report entitled "Kentucky Jails: A Financial Overview") and the average pretrial release duration of 77 days, the increase in release from 65% to 70% saved Kentucky's counties approximately $25,618,092 over the last year (less any amount that would have been collected from prisoners upon completion of their stay pursuant to KRS 532.358).

Expand DPA's Social Worker Program to Assist Courts in Addressing the Needs of Offenders and Reduce Jail and Prison Costs

For more than six years now, a few DPA offices have employed social workers to assist attorneys in presenting individualized treatment and alternative sentencing plans to courts for clients who would otherwise be incarcerated. DPA social workers assess clients then begin working with them to getting them placed in treatment and other social services to address their addictive disease and their other mental health and social problems. DPA uses case management approaches that are consistent with the evidence-based practices used in the mental health programs in the state.

According to a study by the University of Louisville School of Social Work, each DPA social worker produces a net savings of $100,000 per year in incarceration costs even after the costs of the worker and treatment plan are considered. Unfortunately, DPA only has funding for 8 social workers covering 33 counties, meaning courts in more than 2/3 of the state have no access to a DPA social worker.

DPA's Social Worker Program has a proven track record of accomplishing the goals House Bill 463 was intended to reach, reducing incarceration while protecting public safety. The likelihood that an alternative to incarceration will be successful is greatly enhanced by a meaningful and effective treatment plan designed specifically for an individual by a caring and trained social worker. DPA stands ready and eager to provide this assistance if funding for an expanded Social Worker Program is available.

Create a New Classification for "Gross Misdemeanors"

Kentucky should create a new "Gross Misdemeanor" classification that would fall in between Felonies and Misdemeanors, as exists in other states (including Minnesota and Washington). This would be preferable to a Class E felony because it would eliminate the designation of Convicted Felon for many non-violent offenders who deserve significant punishment, but not necessarily the lifetime consequences of a felony conviction.

Possible Characteristics of a Gross Misdemeanors Classification:

- Penalty Range - 6 months to 2 years
- Prosecuted in Circuit Court
- Those convicted would be State Prisoners, but authorized to be housed in county jails
- Conviction would not lead to collateral penalties relating to felonies
- Automatic (or highly presumptive) Probation
- 2-year probationary period
- Expungeable

Examples of Offenses That Could be Characterized as Gross Misdemeanors:

- Possession of Controlled Substance in the First Degree
- Criminal Possession of a Forged Instrument 2nd Degree
- Flagrant Nonsupport
- Tampering with Evidence

Benefits:

- Reduces prison population by lowering the sentence for many non-violent offenses
- Helps reentry and reformation efforts by eliminating the Convicted Felon label
- Holds offenders accountable with sentences of at least six months and up to two years
- Maintains jurisdiction in Circuit Court and with the Department of Corrections to avoid increase in county expenditures

Amend Violent Offender and PFO Statutes to Ensure Kentucky's Heaviest Punishments Are Used to Protect Public Safety

In 2011, Kentucky spent more than $169,000,000 incarcerating almost 8,000 prisoners sentenced under the PFO statute, the Violent Offender statute, or both. While Kentucky citizens should be protected from career and violent criminals, Kentucky's broad PFO statute and greatly expanded Violent Offender statute have led to many offenders being held in prison for sentences disproportionate to their criminal activity. Modest adjustments to both statutes would save millions of dollars for the Commonwealth while not endangering public safety.

Proposed Adjustments to Kentucky's PFO Law (KRS 532.080)

1. Make PFO a discretionary, rather than mandatory, finding by a jury at sentencing.
2. Eliminate PFO enhancements for non-violent felonies.
3. Repeal 10-year parole eligibility requirement for PFO, First-Degree.
4. Prohibit all double enhancements by eliminating PFO for all offenses already enhanced by a prior conviction.
5. Establish "trigger" offenses that are required for PFO to apply
6. Limit PFO application to those who have not had a substantial break in criminal activity
7. Eliminate use of prior felonies that have not resulted in imprisonment from PFO

Proposed Adjustments to Kentucky Violent Offender Law (KRS 439.3401)

1. Reinstate 50% parole eligibility for violent offenders, as originally passed in 1986 and maintained until 1998 when Congress conditioned federal funds on passage of 85% parole eligibility. (No federal funds would now be lost by reverting to the prior law.)
2. Limit the category of violent offenders to those convicted of:
   a. Murder
   b. First-Degree Rape
   c. First-Degree Sodomy
   d. First-Degree Robbery with a Firearm
   e. First-Degree Burglary with a Firearm
   f. First-Degree Assault

Reclassify Minor Offenses to Violations or Civil Infractions

The reduction of minor misdemeanors to violations would save state money on many levels:

- Less Court Proceedings (particularly for violations that could be designated prepayable)
- No appointment of state-provided counsel
- No arrest or jail expenses
- No conditional discharge or supervision costs

Still, defendants would be held accountable for their actions and maintain their trial rights if wrongly accused.

The American Bar Association has adopted a resolution in support of the reduction of appropriate misdemeanors to allow for civil fines instead of criminal penalties. "The decriminalization of minor, nonviolent misdemeanors will allow police, prosecutors, and defense attorneys to focus on more serious cases, while also providing states with a stream of income derived from civil fines." *Decriminalization of Minor Offenses*, ABA State Policy Implementation Project (2010). Under Kentucky's system, this could be accomplished by reducing Class A or B misdemeanors to violations.

The following offenses could be reduced to violations with little impact on public safety:

- No Insurance
- Driving on Suspended License (KRS 186.620)
- Disorderly Conduct
- Theft by Deception, first offense
- Public Intoxication
- Harassing Communications
- Prescription Not in Proper Container
- Unlawful Transaction with Minor – Truancy
- Possession of Drug Paraphernalia
- Possession of Marijuana

Amend Kentucky's Parole Statute to Include a Presumption of Parole for Eligible Low-Risk Offenders

KRS 439.340 requires the Parole Board to consider the risk and needs assessment for a prisoner eligible for parole, but there is no requirement that the Board follow the findings of the assessment or justifies rejection of the findings. As a result, the Parole Board enjoys practically unfettered discretion in granting or denying parole. This discretion allows for large swings in

Declining Parole Rates Have Limited the Success of House Bill 463

Prisoners eligible for parole are being granted parole at a declining rate. The number of inmates paroled in FY12 was 1,326 lower than the number in FY11 while the number of serve-outs and deferrals increased substantially. Thus, while the prison population has declined significantly, it has not declined as much as forecast.

parole rates, like the past year's downward trend.

Kentucky's current parole policies require the decision to be based on one of sixteen factors, effectively permitting decisions based solely on the subjective impressions of the panel members presiding over the decision. Consequently, many inmates who could be safely returned to the community are instead remaining in prison at great cost to taxpayers and without any appreciable long term benefit to public safety.

There is a better approach. In recent years, other jurisdictions have moved towards a model which puts the risk and needs assessment at the center of the decision making process. See, e.g., National Institute of Corrections, Comprehensive Framework for Paroling Authorities in an Era of Evidence-Based Practices, Nancy Campbell, pp. 54-57 (2008)(noting changes in Pennsylvania and Maryland which require the board to use the risk assessment as the starting point of their decision making process); See also National Institute of Corrections, Evidence-Based Policy, Practice and Decisionmaking: Implications for Parole Authorities, George M. Keiser and Cathy Banks, pg. 10 (March 2011) (Requiring that "[d]eterminations regarding the timing of parole release and requirements of release are guided by clear policy that incorporates an assessment of risk as well as a structured consideration of other factors as defined by the sentencing structure of the jurisdiction.").

KRS 439.340 should be amended so that Parole Decisions are guided by a similar process to pretrial release decision under KRS 431.066, created by HB 463:

KRS 431.066
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(2) When a court considers pretrial release and bail for an arrested defendant, the court shall consider whether the defendant constitutes a flight risk, is unlikely to appear for trial, or is likely to be a danger to the public if released. In making this determination, the court shall consider the pretrial risk assessment for a verified and eligible defendant along with the factors set forth in KRS 431.525.

(3) If a verified and eligible defendant poses low risk of flight, is likely to appear for trial, and is not likely to be a danger to others, the court shall order the defendant released on unsecured bond or on the defendant's own recognizance subject to such other conditions as the court may order.

Just as this statute guides district judges in the application of their discretion, a similar statute could guide the Parole Board. The Board would retain the ultimate discretion to determine risk levels, but the statute would require release on appropriate conditions for any prisoner found to be a low risk:

PROPOSED AMENDMENT TO KRS 439.340

When the Parole Board considers release on parole for any prisoner, the Board shall consider whether the prisoner is likely to fail to comply with conditions of release or is likely to be a danger to the public if released. In making this determination, the court shall consider the risk and needs assessment for the prisoner along with other pertinent information.

If a prisoner is likely to comply with conditions and release and is not likely to be a danger to the public if released, the Board shall grant parole subject to conditions the Board deems appropriate.

Reform Kentucky's Death Penalty System, as Recommended by the American Bar Association Assessment Team

The American Bar Association's Evaluating Fairness and Accuracy in State Death Penalty Systems: The Kentucky Death Penalty Assessment Report was issued December 7, 2011 after two years of research and analysis by an independent team of respected Kentucky professionals and criminal justice experts. It is an historic, comprehensive, evidence-based review of the way capital cases are conducted and the death penalty is administered in our state. The Report found major deficiencies in Kentucky that undermine the integrity and reliability of our state's system. Reforms are proposed in twelve key areas: (1) the collection, preservation, and testing of DNA and other types of evidence; (2) law enforcement identifications and interrogations; (3) crime laboratories and medical examiner offices; (4) prosecutorial professionalism; (5) defense services; (6) the direct appeal process; (7) state post-conviction proceedings; (8) clemency; (9) jury instructions; (10) judicial independence; (11) treatment of racial and ethnic minorities; and (12) mental retardation and mental illness. The American Bar Association and the Kentucky Death Penalty Assessment Team called for a suspension of executions in Kentucky until the recommendations in its December 7, 2011 report are fully implemented.

In 2013, DPA will support efforts to implement the reforms recommended by the ABA Assessment Team.

Criminal Defense Practitioners See the Positives and Negatives of House Bill 463

In August 2012, DPA conducted a survey of 54 trial attorneys from around the state to gauge opinions of the success of House Bill 463 in achieving its stated goals. Here are the highlights of that survey:

Positive Reviews

- 98% reported that HB 463 had been successful in at least one change.
- 50% said Lower Sentences for Drug Possession had been a success in reducing incarceration with only 8% believing it had failed.
- The threshold amounts to distinguish peddlers from traffickers was seen by 32% as a success in reducing incarceration with only 6% responding that it had failed in that goal.

Mixed Reviews

- 54% listed Increased Pretrial Release as a success, with 30% saying it was the single biggest success of HB 463. On the other hand, 40% said that the promise of Increased Pretrial Release had failed in their area.

Negative Reviews

- Deferred Prosecution was viewed as a success by only 22% while 38% believe it had failed to accomplish its intended purpose. Over half the responders said a prosecutor in their area would not approve any cases for Deferred Prosecution.
- Only 35% responded that granting of probation was more likely in circuit court now than prior to HB 463. Even less, 20%, said that probation was revoked less now than before HB 463, despite the new revocation standard in KRS 439.3106.

In comments to the survey, attorneys expressed frustration with what they saw as active resistance to implementation of the new pretrial release provisions by some district courts who maintained practices inconsistent with HB 463. Deferred Prosecution is not an option in many areas with prosecutors offering only pretrial diversion or standard guilty plea offers. Many prosecutors who allow Deferred Prosecution are requiring binding stipulations to some elements of the offense (i.e. chain of custody, identity of the substance, possession by the defendant) or mandatory drug court participation in every case.

Denials of Deferred Prosecution are Currently Being Considered in the Court of Appeals

As demonstrated in the survey above, Deferred Prosecution is not available in many parts of the state as prosecutors, for various reasons, decline to agree to a deferral. In at least two pending appellate cases, *Billy Jones v. Commonwealth,* 2011-CA-001298, and *Willie Johnson v. Commonwealth*, 2011-CA-001963, defendants are challenging the decisions of prosecutors to deny their request for a Deferred Prosecution.

The defense position in these cases is that HB 463 created Deferred Prosecution as the "preferred alternative" in appropriate cases and established a standard whereby prosecutors must demonstrate that a case is not appropriate. If prosecutors do not meet that standard, then a court has the authority to order that Deferred Prosecution be made available. The Commonwealth's position is that prosecution is an exclusively executive function and that a prosecutor's discretion as to whether and how to prosecute cannot be limited by a court.

An oral argument was held before a panel of the Court of Appeals in the *Jones* appeal in July 2012 and a decision is expected in a few months. Whatever decision is rendered by the Court of Appeals, the Kentucky Supreme Court will have an opportunity to review the case in 2013.

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The Advocate

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